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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 169

GROCERY DRIVERS UNION LOCAL 848, ETC., *et al.*,

Appellants,

vs.

SEVEN UP BOTTLING COMPANY OF LOS ANGELES, INCORPORATED,

Appellee.

On Appeal From the Supreme Court of the State of California.

PETITION FOR REHEARING.

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Appellants,

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SEVEN UP BOTTLING COMPANY OF LOS ANGELES, INCORPORATED,
Appellee.

On Appeal From the Supreme Court of the State of California.

PETITION FOR REHEARING.

Grounds for Rehearing.

Appellee presents the following grounds requiring this Court to grant a rehearing in this case:

1. The decision insofar as it might be interpreted as denying the State Court from granting damages is *inconsistent* with the *Garmon* case, because the National Labor Relations Board has clearly determined that the type of jurisdictional strike conduct here involved is neither protected nor prohibited by the Labor Management Relations Act, 1947. (Taft-Hartley.)

2. The decision leaves uncertain the question as to whether Appellee-Employer should be granted complete relief by way of injunction and damages.

3. The decision fails to clarify the point that the State's compelling interest in this particular situation allows it to grant complete relief.

4. The decision fails to consider the application of the due process clause of the Constitution.

5. The decision overlooks and completely disregards the distinctions, both factual and legal between *Garmon* and this case.

6. The decision as it stands is vague and uncertain in its application.

ARGUMENT.

I.

This Court's Decision Here Is Inconsistent With Its Decision in Garmon Because the Board Has Determined the Conduct Here to Be Neither Protected Nor Prohibited.

The Court remanded this case ". . . for modification in light of *San Diego Building Trades Council v. Garmon*" (No. 66, O. T. 1958). The *Garmon* decision is based on the theory that a State Court lacks jurisdiction to regulate organizational or recognition picketing which might be *protected* or *prohibited* by the Taft-Hartley Act.

The National Labor Relations Board, by compelling precedents, has determined that the type of jurisdictional strike activity involved in this case is not protected nor prohibited by the Taft-Hartley Act. Therefore, insofar as the remand applies to the damage aspect of the State Court's decision, and assuming the remand might mean that the State Court lacks jurisdiction to grant damages, the remand is erroneous and is inconsistent with the theory of the *Garmon* case.

A. To begin with, there is no question but that a jurisdictional dispute was involved here and the National Labor Relations Board has repeatedly clearly determined that the type of jurisdictional dispute conduct engaged in by the *Appellant Union* is *not* protected activity.

Hoover v. N. L. R. B., 191 F. 2d 380 (1951);

Ohio Ferro-Alloys v. N. L. R. B., 213 F. 2d 646 (1954);

N. L. R. B. v. Electronics Equip. Co. Inc., 194 F. 2d 650 (1952) and 205 F. 2d 296 (1953).

B. Likewise, the National Labor Relations Board has also clearly determined that such conduct is *not prohibited.* This is because such conduct is an unfair labor practice *only*, but *only if* the incumbent union has been certified as the exclusive bargaining representative pursuant to a representation election conducted in accordance with Section 9(f), (g) and (h) of the Act.

L. M. R. A., Sec. 8(b)(4) (c), 29 U. S. C. A., Section 158 (b)(4)(d), 29 U. S. C. A., Section 141, 151, 160 L;

Bennaz, Etc. v. N. L. R. B., 230 F. 2d 47 (1950);

N. L. R. B. Gen. Coun. Adm. Rule, Case 1113, 1-23-55, 35 L. R. R. M. 1533;

Address by Gen. Coun. of N. L. R. B.,, 5-13-54, 34 L. R. R. M 78 and 79.

See:

Brown v. Roofers & Waterproofers Local 40, 86 Fed. Supp. 50 (1949);

LaBurnum v. Los Angeles Building Trades Council, 84 Fed. Supp. 629 (1949);

Juneau Spruce v. I. L. W. U., 83 Fed. Supp. 224, *et seq.*;

Carpenters v. Sperry, 170 F. 2d 863.

Here, neither of the unions was certified by the Board. Therefore, the conduct by the Appellant Union could not possibly be prohibited by the National Labor Relations Board under the Act.

If the *Garmon* decision, in either the majority or the concurring opinions, is to have any meaning in the practical application of the law, the above conclusion that the conduct is *not protected nor prohibited* must be so.

The majority stated:

> ". . . the Board may decide that an activity is neither protected nor prohibited and thereby raise the question whether such activity may be regulated by the States."

and that:

> ". . . In the absence . . . of compelling precedent . . .it is not for this Court to decide whether such activities are subject to state jurisdiction."

The concurring justices said, with respect to the *Russell* (356 U. S. 634) and *Laburnum* (347 U. S. 656) cases:

> ". . . it was possible to decide that question *without prior reference* to the National Labor Relations Board . . ." (Emphasis added.)

and that:

> "To determine the need for initial reference to the Board . . ."

Here, there is no "need for initial reference to the Board." It is not only possible but proper in accordance with *Garmon* to decide this case without prior reference to the Board in accordance with the Board's compelling precedents that the activity involved here is *neither protected nor prohibited.*

Therefore, the remand insofar as it applies to damages and as it now stands, is *inconsistent* with *Garmon*. To harmonize the two decisions, this Court should affirm the decision as to damages.

II.

Modification Results in Complete Relief to the Appellee.

In view of the fact that the National Labor Relations Board has clearly determined that the type of jurisdiction dispute conduct here involved is neither protected nor prohibited, it seems clear in the light of *Garmon,* that the California Supreme Court should have affirmed the judgment of the trial court awarding injunctive relief and damages to appellee. However, the California Court granted leave to appellants to alleged and attempt to prove that appellee is engaged in commerce and covered by the Taft-Hartley Act.

Insofar as this Court's modification applies to that portion of the California Supreme Court's decision, it seems to appellee that there is no need for a trial on the issue of coverage of appellee by the Federal Statutes, and that the judgment for damages and injunctive relief should be sustained by this Court. Particularly in view of the fact that appellants conceded that appellee is in intrastate commerce. (Resp. Br. p. 30.)

> "No other information appears which would in any way show that appellant is engaged in or affects interstate commerce within the meaning of the Labor Management Relations Act of 1947. There is no showing of fact whatsoever which would show the appellant to be under the jurisdiction of the National Labor Relations Board."

The California Supreme Court also stated:

> ". . . There is no allegation showing that plaintiff was engaged in a business affecting interstate commerce and hence the Labor Management Relations Act of 1947, supra, has no application." (40 Cal. 2d 368-372, 254 P. 2d 544, 547 (1953).)

However, we respectfully submit that the opinion of this Court should make a determination on these issues instead of leaving such determination to the California Supreme Court with the result that this case may come before this Court for a second time as in *Garmon*.

III.

The Compelling State Interest in Regulating the Conduct Involved Here Supports the Theory That the State Has Jurisdiction to Afford Complete Relief.

The lower court found that bona fide and valid contracts with one of the Unions had been in effect for many years and that both unions were proper unions and not dominated by the Employer, and that the Appellants were seeking to destroy the Employer's business for the purpose of forcing the employer to breach its contract with one of the unions and to sign a contract with the Appellant union. Such activity constituted a tort under the statutory law of California and the common law of almost all the States, just as surely as though Appellants had used guns or had destroyed the Employer's physical property or tortiously taken possession of its plant. The complaint did allege an assault upon one of the employees. [Tr. 15, 4th Cause of Action, 4th paragraph.]

The California Jurisdictional Strikes Act is a statutory regulation of the common law that inducing a breach of contract or inducing persons not to deal with another, or interfering in the conduct of his business, constitutes a tort

unless such interference is privileged. (*Restatement, Torts, 766.*)

It is also clear that where a group of persons not in the employ of the appellee engaged in such interference with the Employer, and where there is no labor dispute between the appellee and its own employees, such interference is not protected or privileged. (*Restatement, Torts,* 806, 808, 813-816); 29 Cal. Jur. 2d 705.) The jurisdictional strike conduct touches interests deeply rooted in local feeling and responsibility and Congress has not expressly or impliedly deprived the State of California of the power to regulate such activity. The conduct is not subject to regulation by the National Labor Relations Board. No provision has been made by Congress at any time to cover problems of torts.

> *United Construction v. Laburnum,* 347 U. S. 656, 665, 666, 669.

The State of California has legislatively defined the conduct involved herein to be a tort. The Supreme Court of California unanimously held this important declaration of public law by the California Legislature to be constitutionally valid.

> *Seven Up Bottling Company, etc. v. Grocery Drivers Local 848,* 40 Cal. 2d 368, 354 P. d 544 (1953).

Such conduct is a tort by normal rules of society. Congress did not intend to displace State jurisdiction to provide a remedy to a party whose rights have thus been violated. Examples of other torts of a non-violent character are libel and slander.

Therefore, unless the modification is clarified, the State Court should afford complete relief in accord with its "compelling state interest" as set forth in *Garmon.*

IV.

Any Other Interpretation of the Modification Decision Would Deprive the Employer of Property Without Due Process of Law.

The business of appellee is a property right protected by the Constitution of the United States.

Coppage v. Kansas, 235 U. S. 1, 14.

As was said by Mr. Justice Brandeis for the whole Court is *Dorchey v. Kansas,* 272 U. S. 306, 311, 71 L. Ed. 248, 269:

> "The right to carry on business . . . has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification, but a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. . . ."

If this Court's decision were interpreted so as to deny the Appellee-Employer damages, in the event its business affected interstate commerce, then the Employer would be deprived of property without due process of law because the Board is not empowered to grant damages; the activity is neither protected nor prohibited by the Federal Law. The effect of this Court's decision is to hold that the State Court lacks jurisdiction to grant damages under its own law, even though the conduct which causes the injury is not covered by Federal Law. Such an interpretation frustrates application of the legal maxim that there must be a remedy for every wrong. Surely this Court does not intend to thus deprive appellee of the constitutional guarantees of the Fourteenth Amendment.

V.

The Facts, Issues and Law Involved Require That This Case Be Considered Separately From Garmon.

In their Supplementary Jurisdictional Statement, the Appellants state:

> "The following facts distinguish the instant case from Garmon and justify its separate consideration." (p. 1.)

and

> "None of the foregoing important questions of law are presented on the record or in the briefs filed in the Garmon case . . ." (P. 3.)

In Appellee's Reply to Appellants' Supplemental Jurisdictional Statement, Appellee stated:

> ". . . we submit, as do Appellants, that this case should be considered separately from Garmon; . . ." (P. 5.)

Thus, both parties have argued to this Court that this case is different from *Garmon* both factually and legally and Appellees re-assert that contention here.

Without being redundant by repeating these arguments of both parties, Appellee poses here one of the problems giving rise to the arguments as an illustration of the need for separate consideration and determination of this case.

Practically all of the decisions of this Court dealing with the problem of pre-emption have primarily involved the jurisdiction of the State Courts as against the jurisdiction of the National Labor Relations Board. One of the cases, however, dealing with that general problem has held that "any Court," *including a State Court*, has the jurisdiction to award damages for violations of Section

303 of the Labor Management Relations Act independently of what the Board determines, and without a prior determination by the Board.

> *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U. S. 237, 96 L. Ed. 275 (1952).

Section 303(b) of the Act provides:

> "(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, *or in any other court having jurisdiction of the parties*, and shall recover the damages by him sustained and the cost of the suit." (Italics added.) (29 U. S. C., Sec. 187(b).)

And, there are cases where the same factual situation was involved but the Board and the District Courts made adverse rulings and both decisions were upheld on appeal. See *National Labor Relations Board v. Deena Artware, Inc.*, 198 Fed. 645 (1957), and *United Brick Workers v. Deena Artware, Inc.*, 198 F. 2d 637 (1952), where the Board in an unfair labor practice proceeding found that there had been no secondary picketing, but a District Court in an action under Section 303 found that there had been such picketing and awarded damages. Both cases were uphld on appeal.

This emphasizes one of the important problems here involved. Even *assuming* the activity is prohibited by the Federal law because it is an unfair labor practice, nevertheless, the State Court as a court of competent jurisdiction under the *Juneau Spruce, supra*, case, has jurisdiction to award damages against appellants for engaging in

secondary boycott and jurisdiction strike activities in violation of Section 303(a). (29 U. S. C. A., Sec. 187(a), (b).) Whether it must apply the Federal law as to damages, or whether if the activity is not prohibited by the Federal law and is therefore unregulated, it can apply a State law as to damages in that area unregulated by the Federal law, is unknown at this time.

While the conflict in decisions that the Court has been concerned about, might occur here where Congress has provided for the award of damages and potentially the Board, prohibiting unfair labor practices, a Federal Court and a State Court can pass upon identical legal and factual issues, the danger that the decisions might be different does not impair the *power* of any one of the three, including the State Court, to decide them. This honorable Court, of course, is constitutionally charged to make application of the laws uniform by acting as the appellate court of last resort.

The *Garmon* decision does not solve the problem posed. Therefore, this Court should grant this Petition for Rehearing and entertain both written and oral arguments on all of the problems involved.

VI.

The Decision Is Vague, Uncertain, and Ambiguous.

This Court by its decision here has created problems which can be resolved only by additional litigation and needless expense to all parties—unless this Court reconsiders its action in this case and allows full argument by counsel.

As it now stands, the decision:

(1) Leaves undecided the question as to whether the State Court should grant complete relief because

the activity involved is neither protected nor prohibited;

(2) Leaves unsettled whether the California Court should affirm or reverse its decision as to:

(A) Damages;

(B) Injunctive relief;

(C) Directing the trial court to take evidence on commerce.

(3) Creates uncertainty in the law insofar as an action for damages is concerned for it fails to settle the problem whether a party must first go to the Board when the Federal Law expressly authorizes State Courts to award damages as in Section 303 actions. The decision implies that a litigant as a condition of filing a damage action in Court, must first get a ruling from the National Labor Relations Board as to whether conduct complained of in a damage action is protected conduct. The Federal Statute does not authorize nor does the National Labor Relations Board issue rulings as to whether certain conduct is protected. The Board only acts upon a charge filed by any person, and then only rules as to whether a specific section of the Act has been violated by the party charged. Neither the General Counsel nor the Board have statutory authority to initiate proceedings leading to a determination as to whether certain conduct is protected or prohibited.

(4) Fails to decide whether Section 303 and the related sections pre-empt the field as to their subject matter.

(5) Indicates without deciding that a State Court has jurisdiction to apply its own Jurisdictional Strikes Law, but fails to state in what circumstances.

To detail the additional uncertainties unresolved and created would require a repetition, in part, of some of the arguments made herein, as well as those presented in the briefs on file in this case.

Conclusion.

Appellee respectfully submits that the proper disposition of this case can be made only after full briefing and oral argument by both counsel.

In the alternative, Appellee requests an elaboration of the decision with instructions, if necessary.

Respectfully submitted,

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HILL, FARRER & BURRILL,
By CARL M. GOULD,
Attorneys for Appellee.

Certificate of Counsel.

Carl M. Gould of Hill, Farrer & Burrill, and Thomas P. Menzies of counsel for Seven Up Bottling Company of Los Angeles, Incorporated, do hereby certify that in their judgment the Petition for Rehearing is well founded and is not interposed for delay.

CARL M. GOULD
THOMAS P. MENZIES.